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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-770

REV. LEON HOWARD and BARNEY SCHOBY,
Individually and on Behalf of All Others
Similarly Situated,
Petitioners,

vs.

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER and E. A. REDD, Members of the Adams County Board of Supervisors,
Respondents.

BRIEF OF RESPONDENT BOARD OF SUPERVISORS IN OPPOSITION TO PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI

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The case now before this Court on Board of Supervisors' petition for writ of certiorari and petition for the writ filed by Plaintiffs below was first tried by the United States District Court for the Southern District of Mississippi in June, 1971. The opinion of the District Court is not reported but appears as Appendix 1 to Board of Supervisors' petition for writ of certiorari. The appearances of the case before the Court of Appeals prior to the second trial are Appendices 2, 3 and 4 to said petition. Appendix

4 is reported as *Howard* v. *Adams County Board of Supervisors,* 453 F.2d 455 (1972), cert. den. 407 U.S. 925, 32 L.Ed.2d 812, 92 S.Ct. 2461 (June 19, 1972).

The second trial of the case in May of 1972 was at the direction of the Court of Appeals to have been limited to the one issue of malapportionment. The District Court opinion is Appendix 5 to Board of Supervisors' brief on petition for the writ. The third and last opinion of the Court of Appeals appears as Appendix 6 to said brief and is reported in 480 F.2d 978.

All of the opinions are an integral part of this case and must receive this Court's attention in consideration of the questions presented. Each of the opinions will be referred to herein by the appendix number and page as each appears in brief of Board of Supervisors for writ of certiorari dated November 1, 1973, and filed and docketed in this Court as Cause No. 73-723.

The question presented by Plaintiffs' petition is whether Plaintiffs are entitled as a matter of constitutional right to have the population of Adams County distributed in such a manner that Plaintiffs are satisfied that blacks have a voting majority in at least two of the supervisor districts and whether this Court will entertain such a contention when the Plaintiffs' argument has been twice rejected by the United States District Court, twice rejected by the Court of Appeals for the Fifth Circuit and once rejected by this Court.

The one fact which emerges from the literally thousands of words which have been written about this litigation, spanning almost three years, two lengthy trials, three appeals to the Court of Appeals and one to this Court, is that Plaintiffs have reduced the questions in every instance to black versus white. Politically the notion is outdated in

Adams County. The District Court after the first trial held:

> "Since enactment of the Voting Rights Act in 1965 the registration and election officials of Adams County have denied no person the right to register to vote or the right to vote on account of race or color, and it has never been necessary to request the assistance of Federal Registrars and none have ever been sent into Adams County. The last re-registration in Adams County was conducted in 1956."

and the District Court concluded:

> "(5) the redistricting of Adams County was accomplished without the purpose or effect of overturning a Black majority in District 4 or in unconstitutionally diluting the Black vote in that district or in any other district, including District 4 or any other district of Adams County;"

Moreover, the results of recent elections, state, county and city, dispute the underlying premise that blacks are "frozen out" of the political process. In 1967 county elections no black offered for election to office of supervisor. One black ran for justice of the peace of District No. 4 and was elected. Four blacks offered for district constable. The candidate in District No. 4 was elected. The three other blacks running, one in District No. 1 and two in District No. 5, were all defeated.

The 1971 state and county elections saw the following results:

Judge Scott, the black justice of the peace from District No. 4, was re-elected without opposition. In District No. 4 a black candidate for constable defeated a white candidate. In the same district Leon Howard, one of the

Plaintiffs and a black, was defeated by the white incumbent supervisor. The other named Plaintiff, Barney Schoby, also a black, ran for the State Senate and carried District No. 4 and obtained a substantial vote in the remainder of the County.

It is interesting to note that in the 1971 state and county contested elections, of the seven (7) black candidates five (5) carried District No. 4 and two (2) did not.

Additionally, in June, 1972, the City of Natchez held its elections for mayor and aldermen in which candidates run on an at large basis. A black candidate for alderman, Ward 2, defeated the white incumbent for the same post. Whites were elected to the other five aldermanic offices.

It is an unsupported position to urge racial bloc voting in Adams County and to premise the argument of unconstitutional redistricting on the theory that given a black population majority, blacks by racial bloc voting will or even can elect a black. The whole argument is diametrically opposed to the fundamental premise that all redistricting must be accomplished with an "eye that is color blind."

The pre-1970 supervisor districts were grossly malapportioned ranging from a low in District No. 2 of 800 people to a high in District No. 4 of 16,832. Plaintiffs assert that the pre-1970 District No. 4 should be divided into two districts even though a redistricting plan which from a racial standpoint had the approval of the District Court, Court of Appeals and this Court, has intervened in point of time. The theory is in itself obvious racial gerrymandering.

The thrust of Plaintiffs' argument now is that blacks are entitled to have the district lines drawn so that blacks will have a majority of population in at least two districts

and seek to accomplish this purpose by dividing old District No. 4 into two new districts, each of which will have a substantial black majority. This was answered by the United States Supreme Court in *Conner* v. *Johnson*, 279 F.Supp. 619 (1966), affirmed per curiam 386 U.S. 483, 18 L.Ed.2d 224, 87 S.Ct. 1174:

> "It has thrice been held by three judge district courts, applying Wesberry, that one factor and only one, may be taken into account in apportioning and establishing Congressional districts among the people of a state and that factor is population. Calkins v. Hare, D.C., 228 F.Supp. 824; Meeks v. Anderson, D.C., 229 F.Supp. 271 at page 273, and Bush v. Martin, D.C., 224 F.Supp. 499 at page 511, affirmed, sub nom. Martin v. Bush, 376 U.S. 222, 84 S.Ct. 709, 11 L.Ed.2d 656 (1964)....
>
> "As to point 1, suggesting that the Congressional Districts should have been so arranged as to ensure the election of at least two Negro Members of Congress, we have only to point to the unanswerable logic of what Mr. Justice Douglas said (dissenting opinion) on this subject, in Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512, reh. den. 376 U.S. 959, 84 S.Ct. 964, 11 L.Ed.2d 977." 279 F.Supp. at 623.

The logic of Mr. Justice Douglas is, as pointed out in *Conner*, truly unanswerable:

> "Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition—'of the people, by the people, for the people.' Here the individual is important, not his race, creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be repre-

sented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. Cf. Gray v. Sanders, 372 U.S. 368, 379, 9 L.Ed.2d 821, 829, 83 S.Ct. 801. The racial electoral register system weighs votes along one racial line more heavily than it does other votes. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the consitutional sense. Of course, race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines." *Wright* v. *Rockefeller,* 376 U.S. 52, 66, 11 L.Ed.2d 512, 521, 84 S.Ct. 603 (1964)

and

"When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here." Supra, 376 U.S. at 67, 11 L.Ed.2d at 522.

This same contention advanced by the Plaintiffs at bar was also met and rejected in *Whitcomb* v. *Chavis,* employing, in part, this language:

"If this is the proper view of this case, the failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than a built-in bias against poor Negroes. The voting power of ghetto residents may have been 'can-

celed out' as the District Court held, but this seems a mere euphemism for political defeat at the polls.

"On the record before us plaintiffs' position comes to this: that although they have equal opportunity to participate in and influence the selection of candidates and legislators, and although the ghetto votes predominantly Democratic and that party slates candidates satisfactory to the ghetto, invidious discrimination nevertheless results when the ghetto, along with all other Democrats, suffers the disaster of losing too many elections. But typical American legislative elections are district-oriented, head-on races between candidates of two or more parties. As our system has it, one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. This is true of both single-member and multi-member districts. But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called 'safe' districts where the same party wins year after year." *Whitcomb* v. *Chavis*, 403 U.S. 124, 153, 29 L.Ed.2d 363, 381, 91 S.Ct. 1858 (1971)

Surely, constitutional safeguards are for every citizen, not just black ones. The phrase "regardless of race" must have universal application. Plaintiffs at bar seek to have district lines drawn on the basis of race. Such lines are no less unconstitutional merely because they have the blessing of blacks. Recognition, if such is needed, is given to this suggestion by the Court in footnote 34 in the opinion in *Whitcomb* v. *Chavis*:

"Interestingly enough, in Wright v. Rockefeller, 376 U.S. 52 (1964), challenge was to a single-member district plan with districts allegedly drawn on racial lines and designed to limit Negroes to voting for their own candidates in safe Negro districts. We rejected the challenge for failure of proof, but noted in passing that'. . . some of these voters . . . would prefer more even distribution of minority groups among the four congressional districts, but others, like the intervenors in this case, would argue strenuously that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional.' 376 U.S at 57-58." Supra, 403 U.S. at 156, 29 L.Ed.2d at 363.

Furthermore, the Court of Appeals has particularly addressed itself to the contention that old District No. 4 should be divided into two new districts in saying:

"Further, we reject the plaintiffs' notion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts. This rationale was rejected by Justice White for the majority in Whitcomb, saying that such a contention

'. . . (is) expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization . . . who live in what would be safe dis-

> tricts in a single member district system but who ... are submerged in a one-sided ... vote.
>
> '... (It) is not at all clear that the remedy is a single-member district system with its lines carefully drawn to ensure representation to sizable racial, ethnic, economic, or religious groups and with its own capacity for overrepresenting and underrepresenting parties and interests . . .'" 403 U.S. at 156, 160.
>
> *Howard* v. *Adams County Board of Supervisors,* 453 F.2d 455, at 458.

And on the second trial of this case the District Court concluded:

> "This Court, having familiarized itself with the previous record in this case, finds that plaintiffs, having failed before in convincing either the District Court or the Appellate Court that they are constitutionally entitled to a majority population in two beats, have done nothing more in their proposed plan in this trial than make the same contention again as reflected in their plan herein presented." (A. 65)

On the last appeal to the Court of Appeals the Court concluded:

> "There is nothing new in the racial dilution arguments contained in this appeal. We are consequently bound by and adhere to the prior panel decision on that subject." (A. 73)

Plaintiffs' arguments presently being considered by the Court on petition for writ of certiorari are neither new to this case nor are they new to this Court. At page 7 of Plaintiffs' brief counsel capsules their argument:

"Instead of simply subdividing old District 4 into two new districts equal in population, both of which would have contained black majorities, the all-white Board of Supervisors approved a plan which carved up old District 4 among all five of the new districts, fragmenting areas of heavy black population concentration among the new districts, and thereby minimizing the number of black voters residing in each of the new districts (except one) and diluting black voting strength in Adams County."

In Plaintiffs' petition for writ of certiorari filed in this Court as Docket No. 71-1406, precisely the same position rests at the heart of Plaintiffs' objection to the Board of Supervisors' redistricting plans:

"1. Whether manipulation of election district boundaries on the basis of race by abandoning pre-existing district lines and crossing neighborhood boundaries to disperse a heavily black population concentration (here, old District Four) among four new election districts and thereby maximizing the number of white majority districts and minimizing the number of black majority districts constitutes unconstitutional and unlawful racial gerrymandering." (p. 2)

and

"Although blacks previously had a majority in only one district, District Four, their population was sufficiently large that, in the language of the reapportionment cases, District Four voters were 'constitutionally entitled' to two supervisors, not one. The redistricting plan, which dispersed this second black majority among three new white majority districts, thus robbed those black voters of the opportunity to elect a second black supervisor which they would have had if

> the redistricting had been accomplished on a fair and non-racial basis—by dividing old District Four in half, providing for two black majority districts." (p. 26)

Turning to Plaintiffs' brief, Defendants are constrained to dispute several assertions as either unwarranted conclusions or simply misstatements.

ONE. In the first few lines of Plaintiffs' brief there appears a reference to the black voting majority in Supervisor District Four. The reference is to old District Four, that is, the pre-1970 District Four. It is a matter of record and the Court of Appeals in its last opinion held that:

> "Further pursuing the subject of dilution of the racial voting power, neither the plaintiffs nor the defendants have provided us with data as to voting strength in the various proposed districts now under review."

Plaintiffs' effort at transforming a population majority to a voting majority is at best an assumption which the Court of Appeals has held to have no basis in the record. Furthermore the Plaintiff Schoby admitted on the first trial a great deal of difficulty in getting blacks to register to vote. The point is simply that every court that has heard this case has found that the redistricting efforts of the Defendants have been free of racial overtones and that there has been no voter discrimination in Adams County since 1965. Nonetheless Plaintiffs attempt to inject voter discrimination into the case where the record is bare of any evidence of it. The insidious effort is to conclude a history of racial voter discrimination even though Plaintiffs have wholly failed in their burden of proof of it.

In order to lend a touch of accuracy to the conclusion of "history of racial discrimination" Plaintiffs make the flat assertion that:

> "The switch to at-large elections, which diluted black Adams County voting strength in District 4, was struck down in 1969 as racially discriminatory."

The fact is that this Court held:

> "The discriminatory purpose or effect of the statutes, if any, has not been determined by any Court." *Allen et al.* v. *State Board of Elections*, 393 U.S. 544, 22 L.Ed.2d 1 (1969)

Moreover, the Court said that Section 5 (of the Voting Rights Act of 1965) coverage questions involve "issues subject to rational disagreement" and were not "so clearly subject to Section 5 that the Appellees' failure to submit them for approval constituted deliberate defiance of the Act." 393 U.S. 544 at 572.

The conclusion is inescapable that Adams County has for many years been one of the most progressive in our country. While communities all over the nation were demanding federal registrars to assure that citizens offering to register to vote were not in any manner impeded, no request for registrars was ever made for Adams County. (A. 21) Even prior to the 1965 Voting Rights Act blacks were registered to vote in Adams County when in other areas of the state and country they did not even attempt it. The assertion that Adams County has a "long history of voter discrimination" is not accurate.

TWO. It is true that in the compilation of the 1970 redistricting plan none of the five incumbent supervisors were displaced from their respective districts. However, two important factors contributed to this. First, all five

lived outside of the city limits and of course within the boundaries of the pre-1970 district lines. Since each of the 1970 districts were in the same geographical areas as their pre-1970 counterparts, it resulted that each supervisor remained in his district.

It is also a fact that the state law, *Mississippi Code Annotated,* Section 2870 (1942), now *Mississippi Code Annotated,* Section 19-3-1 (1972) after recodification, provides that redistricting must be accomplished by a unanimous vote of the supervisors. See *Fairley* v. *Patterson,* dec. sub nom. *Allen* v. *Board of Elections,* 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969). Obviously unanimous approval of the members of the board would be difficult if not impossible to obtain if two or more incumbents had been pitted against each other. In any case, the representative of the professional firm employed to accomplish the redistricting testified that he had taken it upon himself to create districts which did not displace a supervisor; that no instruction to that effect came from any supervisor but this was based on his experience with other redistricting plans. (Second Trial R. 213)

The second redistricting plan (December 1, 1971) also left all supervisors in their respective districts but only because they all lived outside the limits of the City of Natchez and in revising and modifying the 1970 plan as ordered by the Court of Appeals Comprehensive Planners shifted district lines within the city limits only, conceiving that the larger the population concentration the fewer enumeration districts to be split by new district lines in equalizing population and the shorter the segments of lines to be relocated.

Plaintiffs attempt to use *Gaffney* v. *Cummings,* ..... U.S. ....., 37 L.Ed.2d 298, 93 S.Ct. ..... (1973), as authority for their position that the redistricting plan before the

Court has blacks "fenced out of the political process and their voting strength invidiously minimized" because the white incumbents were left in their respective districts by the plan. In response, first look to the makeup of the districts as compared to the countywide black and white percentages of population. Countywide blacks account for 48.1% of the total population and whites 51.9%. By district the 1971 plan reflects the following percentages:

	Black	White
District No. 1	45.6%	54.4%
District No. 2	40.7%	59.3%
District No. 3	42.3%	57.7%
District No. 4	77.6%	22.4%
District No. 5	34.1%	65.9%
Total countywide	48.1%	51.9%

While it is undisputed throughout all of the volumes of testimony from the first and second trials of this case that the racial composition of the new districts were unknown until some time after compilation of the plan before the Court, even to Comprehensive Planners (A. 60), the plan did result in black and white percentages of population which "within tolerable limits" compare favorably with the county percentages of black and white. The population ratios in Districts No. 1, 2 and 3 closely approximate the countywide percentage difference. Blacks heavily preponderate over whites in District No. 4 while whites have a heavy majority of population in District No. 5.

So far from being supporting authority *Gaffney* v. *Cummings*, supra, concludes:

> "But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise

within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State."

THREE. Plaintiffs' plan was first submitted for consideration in May, 1972, just three days before the second trial of the case and more than two years after the initial efforts of Defendants at redistricting. No other plan has ever been suggested by Plaintiffs. At the conclusion of the second trial Plaintiffs' plan was rejected:

"This Court, having familiarized itself with the previous record in this case, finds that plaintiffs, having failed before in convincing either the District Court or the Appellate Court that they are constitutionally entitled to a majority population in two beats, have done nothing more in their proposed plan in this trial than make the same contention again as reflected in their plan herein presented. As to this issue, this Court again points to the language of the Appellate Court:

'Further, we reject the plaintiffs motion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts.'

Aside from the plaintiffs' failure to file their plan, timely, the Court finds that it is a complete departure from the obvious intent of the District Court and Appellate Court that this trial be limited to whatever revisions might be necessary to defendants' 1970 plan,

> using 1970 Census figures. This Court finds that, under the laws of the State of Mississippi, boards of supervisors are charged primarily with the maintenance of roads and bridges and that traditionally funds for these purposes have been divided equally among the supervisors, each assuming the responsibility for his own beat. Under plaintiffs' plan, Beat 3 would have no territory, roads or bridges outside municipal limits or jurisdiction. The Court finds that the proposed uses by plaintiffs of enumerator district boundaries established by the Bureau of Census are not necessarily the proper nor legal descriptions required of a board of supervisors and which are readily identifiable from land deed records. The Court finds that plaintiffs have made no provision in their plan for the location of voting precincts in their proposed plan, nor provided a legal description of same. For all of the above reasons, and others as they may have appeared herein, the Court finds that plaintiffs' plan cannot be recommended for approval." (A. 65-66)

And the Court of Appeals affirmed, saying:

> "There is nothing new in the racial dilution arguments contained in this appeal. We are consequently bound by and adhere to the prior panel decision on that subject." (A. 73)

The United States Attorney General, two district courts, the Court of Appeals, two different panels sitting, and this Court on petition for writ of certiorari in Cause No. 71-1406 have all rejected Plaintiffs' argument. Surely the contention has been long since laid to final rest.

As almost every court in the United States, both state and federal, have many times written, in applying the doctrine of res adjudicata, stare decisis, law of the case, estop-

pel by judgment and similar principles of law, "there must some day be an end to litigation."

Defendants respectfully urge that the Plaintiffs' petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that I have served three (3) printed copies of the foregoing Brief of Respondent Board of Supervisors in Opposition to Plaintiffs' Petition for Writ of Certiorari upon George Peach Taylor, attorney for the Petitioners, they being all parties required to be served, by depositing said copies in the United States mail, first class air mail postage prepaid, in an envelope addressed to said attorney at Box 1435, University of Alabama, Tuscaloosa, Alabama 35486.

This 11th day of February, 1974.

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